TAN TIN SWEE

v.

KANGAR PROPERTIES SDN. BHD.

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL SUIT NO. 23-99-86]
21 JUNE 1990

CIVIL PROCEDURE: *Judgement in default of appearance - Setting aside - Irregularity - Misleading information in writ - Service out of jurisdiction - Time period - Fundamental defect - Ex debito justitiae - Order 12 r. 4(a), O. 13 r. 1(1), r. 8 of the Rules of the High Court 1980.*

The plaintiff in default of appearance by the defendant, obtained judgment against the defendant for monies due and payable under an agreement. The defendant filed an application for setting aside of this judgment, arguing firstly that the defendant was not served with the writ on the date and place as stated by the process server in his affidavit and secondly that there had been an irregularity in that the default judgment had been obtained before the expiration of 12 days, this being the period within which the defendant should have appeared as the writ was served outside the jurisdiction.

Held:

[1] All writs and other originating processes are filed in the Alor Setar High Court, there being no registry of the High Court in Kangar. Therefore the endorsement on the statement of claim which refer to the High Court registry at Kangar was misleading.

[2] Since the writ was issued at the Alor Star High Court registry and served outside the jurisdiction in Kangar, Perlis, the time limited for appearing should have been 12 days and that fact should have been endorsed in the writ.

[3] The default judgment was obtained prematurely as it was obtained before the expiration of the 12 days period under O. 13 r. 1(1). The defect is a fundamental one and the judgment obtained is clearly a nullity and should be set aside *ex debito justitiae*.

[Default judgment set aside]

Legislation referred to:
Rules of the Supreme Court [UK], O. 13 rr. 8, 9
Rules of the High Court 1980, O. 2, O. 10 r. 1(4), O. 12 r. 4(a), O. 13 rr. 1(1), 8, O. 62 r. 9

For the defendant/applicant - M. Padmanathan; M/s. Yusof Lee Pathma & Marbeck
For the plaintiffs - Ravindran; M/s. V.M. Mohan

JUDGMENT

KC Vohrah J:

On 28 October 1986 the plaintiff entered judgment by default of appearance of the defendant, a company. The judgment against the defendant was for RM1.1 million being the amount due and payable by the defendant to the plaintiff on an agreement.

On 3 January 1989 the defendant filed an application to set aside the said judgment in default of appearance on the ground that the defendant was not served with the writ on the date and place as stated by the process server in his affidavit; that though one of the directors

had signed on the proof copy of the writ as she having been served with a writ on 18 October 1986 and at Kangar her signature was in fact obtained in Penang and had been obtained through undue influence on the part of the plaintiff.

The application to set aside was heard in chambers and dismissed. On further argument in open Court I allowed the application and set aside the default judgment *ex debito justitiae*.

In the proof copy of the writ served on the defendant the day of the week on which it was served is not endorsed as required under O. 10 r. 1(4) and the plaintiff is not entitled to enter judgment in default of appearance of the defendant unless the Court otherwise orders. Notwithstanding that it was not so endorsed the process server has stated in his affidavit that he had endorsed the day of the week on the writ. In fact the affidavit of service itself did not give the day of the week when the writ was served and this was non-compliance with a requirement under O. 62 r. 9. All these are irregularities but are ordinarily curable in the light of O. 2. But I had to consider these irregularities in the context of some other irregularity which I considered as not being curable.

The nature of the other irregularity is this. The time limited to the defendant for appearing under O. 12 r. 4(a) in the case of a writ served within the local jurisdiction of each High Court in Malaya is 8 days after service of writ (including the day of service). But if served outside such local jurisdiction the time limited for appearing is 12 days. In the present case although the writ purports to have been issued in the High Court at Kangar, Perlis, in actual fact it was issued in the registry of the High Court, Alor Setar, Kedah for service in Kangar. It has been the practice for all writs and other originating processes and all other processes connected therewith in respect of the Kangar High Court to be filed in the registry of the High Court, Alor Setar there being no registry of the High Court in Kangar. They are then issued from the registry of the Alor Setar High Court. And in the Alor Setar registry there is no separate register nor praecipe and other book kept for civil cases meant specially for the High Court in Kangar. In short all civil cases meant for the Kangar High Court are filed and all connected proceedings are dealt with in the Alor Setar registry. Even if the cause of action arises in Kangar the case has to be registered as a Alor Setar High Court case. In the rare instance, as in this particular case, where it is registered as a Kangar High Court case no special distinguishing mark or number is allotted. In fact it is rare for Judges to hear civil cases at the Kangar High Court.

The writ and statement of claim for this suit was filed and issued in the registry of the High Court, Kedah on 18 October 1986. It was endorsed in the writ that the defendant do cause an appearance to be entered within 8 days of the service of the writ on the defendant and that in default of the defendant doing so the plaintiff may proceed thereon to judgment and execution. It was not categorically stated where appearance could be entered; appearance has to be entered at the registry in Alor Setar but the part of the memorandum subscribed in the writ which states that the defendant may enter appearance by post stated that appropriate forms may be obtained from the High Court registry at Kangar and that may well have given the impression that appearance should be entered in the Kangar High Court. And that is misleading as there is no High Court registry in Kangar.

Since the writ was issued at the Alor Setar High Court registry and served outside the local jurisdiction of the High Court, Alor Setar - it was served in Kangar, Perlis - the time limited for appearing should have been 12 days and that fact should have been endorsed in the writ. The writ should have been issued as a writ from the High Court, Alor Setar but since it was issued as a writ from the Kangar High Court there should have been an endorsement

therein, since there is no High Court registry in Kangar, that appearance should be entered at the High Court registry in Alor Setar. In the present case when default of appearance was entered on 28 October 1986, 12 days had not lapsed from the date of service (18 October 1986) and it was taken that no appearance was entered at the Alor Setar registry.

Under O. 13 r. 1(1) final judgment in default of appearance in respect of a liquidated claim may be entered after the time limited for appearing. In the present case default judgment was obtained before 12 days which should have been the time limited for appearing; judgment in default thus was obtained prematurely.

Under O. 13 r. 8 the Court may, on such terms as it thinks fit, set aside any judgment entered in pursuance of O. 13. It will be noted that this rule exists separately from O. 2 which gives power to the Court to set aside proceedings generally.

Substantially corresponding to O. 13 r. 8 is O. 13 r. 9 of the English Supreme Court Rules. *The Supreme Court Practice 1985*, Part I at p. 129 has this passage on the discretionary powers of the Court under O. 13 r. 9 and in respect of a judgment taken prematurely:

> But if the judgment is premature and irregular, defendant is entitled to have it set aside, *ex debito justitiae*, and without terms, except that where costs are given terms may be imposed as a condition of giving costs.

It is quite obvious that this matter of the premature judgment and its other irregularity as regards the place at which appearance should be entered escaped the attention of all parties concerned when the case was argued in chambers and was only brought up in open Court after these defects including the irregularities relating to O. 10 r. 1(4) and O. 62 r. 9 were detected by Counsel for the plaintiff.

I do not think the question of delay in bringing the application to set aside the default judgment and in relying on this ground of irregularity arises in the application; the defect is fundamental; it was obtained prematurely and there was also doubt as to the place at which appearance should have been entered and the judgment obtained is clearly a nullity and should be set aside *ex debito justitiae*. And I set it aside. In doing so I also took into account the other irregularities relating to the non-compliance with O. 10 r. 1(4) and O. 62 r. 9.

Also found at [1990] 2 CLJ 457